APPENDIX A

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re Applications of FLOWER CITY TELEVISION CORP., ROCHESTER, N.Y.	Docket No. 14394 File No. BPCT-2929
GENESEE VALLEY TELEVISION CO., INC., ROCHESTER, N.Y. STAR TELEVISION, INC., ROCHESTER, N.Y.	Docket No. 14395 File No. BPCT-2944
COMMUNITY BROADCASTING, INC., ROCHESTER, N.Y.	Docket No. 14460 File No. BPCT-2948
HERITAGE RADIO & TELEVISION BROADCASTING CO., INC., ROCHESTER, N.Y. MAIN BROADCAST CO., INC., ROCHESTER, N.Y.	Docket No. 14461 File No. BPCT-2953
THE FEDERAL BROADCASTING SYSTEM, INC., ROCHESTER, N.Y. CITIZENS TELEVISION CORP., ROCHESTER, N.Y.	Docket No. 14462 File No. BPCT-2961
ROCHESTER BROADCASTING CORP., ROCHESTER, N.Y.	Docket No. 14464 File No. BPCT-2964
ROCHESTER TELECASTERS, INC., ROCHESTER, N.Y.	Docket No. 14465 File No. BPCT-2966
For Construction Permits for New Television Broadcast Stations (Channel 13)	Docket No. 14466 File No. BPCT-2967 Docket No. 14467 File No. BPCT-2972 Docket No. 14468 File No. BPCT-2974

Decision

(Adopted August 3, 1967)

BY COMMISSIONER LEE FOR THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON DISSENTING AND ISSUING STATEMENTS; COMMISSIONER COX NOT PARTICIPATING; COMMISSIONER WADSWORTH ABSENT.

I. INTRODUCTION

1. The initial decision of Hearing Examiner Annie Neal Huntting (FCC 64D-5, released Jan. 28, 1964) recommended grant of the applications of Rochester Area Educational Television Association, Inc. (RAETA), and Rochester Telecasters, Inc. (RTI). These applications, which proposed a share-time operation on channel 13 in Rochester, N.Y., were complementary and comprised a single proposal; as such they were mutually exclusive with

each of eight other applications.[1] The application of Rochester Broadcasting Corp. (RBC) was denied by the examiner as in default for failure to prosecute its application. RBC has taken no exception to the examiner's recommended disposition of its application.

2. After exceptions, briefs, and replies had been filed to the initial decision, an oral argument was held before the Commission, en banc, on November 2, 1964.[2] During that oral argument each party was afforded an opportunity to address itself to a petition to reopen the record and to remand, which had been filed on October 15, 1964, by all of the applicants except RAETA, RTI, and RBC. After hearing oral argument, we concluded that the existing record did not contain sufficient evidence to resolve the questions of: (*a*) Whether alternative means were available for broadcast of the type of educational programing proposed by RAETA, and (*b*) whether a part-time applicant such as RTI would provide an effective competitive outlet for a third network service. Therefore, we reopened the record and remanded this proceeding for a further hearing so that such evidence could be adduced, FCC 65-403, released May 13, 1965. At the same time, we indicated that each applicant would be permitted to modify its programing proposal to reflect the evolving needs of Rochester. Before any hearing sessions were held, however, the applicants entered

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[1] Throughout this decision those eight applicants will be referred to as follows: Flower City Television Corp. (Flower); Genesee Valley Television Co., Inc. (Genesee); Star Television, Inc. (Star); Community Broadcasting, Inc. (Community); Heritage Radio & Television Broadcasting Co., Inc. (Heritage); Main Broadcast Co., Inc. (Main); the Federal Broadcasting System, Inc. (Federal); and Citizens Television Corp. (Citizens).

[2] The following parties filed motions to correct the transcript of the Nov. 2, 1964, oral argument: Flower, on Nov. 19, 1964; Community, on Nov. 25, 1964; Star, on Nov. 19, 1964; Main, on Nov. 13, 1964; and RTI, on Nov. 24, 1964. No objections to the motions have been filed and they will be granted.

into a series of negotiations. As a result of those negotiations, RAETA requested the dismissal of its application so that it could use the funds it obtained as reimbursement for its expenses in connection with its application to establish a full-time educational television station on another available channel. Thereafter, RAETA's application in this proceeding was dismissed with prejudice, 2 FCC 2d 448 and 1029 (1966), and it commenced operation of station WXXI in Rochester.

3. In addition to the dismissal of RAETA's application, the impact of our *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), which was adopted after the release of the remand order, must be considered in this proceeding, since we clearly indicated that the *Policy Statement* would apply to all cases to be decided in the future. In the *Policy Statement* we noted that program plans often have to be changed to take account of new conditions when the successful applicant begins operation and that our experience indicates that the program plans of competing applicants are so similar that minor differences among them generally prove to be of no significance. For these reasons, we stated that no issue would ordinarily be designated for program plans and policies, or for staffing plans or other program planning elements, and that evidence on these matters would not be considered under the standard comparative issue. As pointed out in the *Policy Statement*, each applicant has the responsibility for being familiar with the community and area to be served and for proposing an adequate programing service to meet the ascertained needs and interests. From our consideration of the record in this proceeding, we are persuaded that each of the applicants has met its obligations in this respect and that variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs. As we stated in the *Policy Statement*, such ordinary differences in judgment will not be compared in the hearing process when each of

the applicants, as here, has demonstrated that it is able to carry out its proposal.[3]

4. In view of these events which occurred after the release of our remand order in this proceeding, we concluded that no further evidentiary submissions would be required and that no useful purpose would be served by permitting the applicants to modify their programing proposals. Accordingly, the remand order was set aside so that this proceeding could be decided on the basis of the existing record (FCC 66-347, released Apr. 21, 1966). Subsequently, because of the circumstances which arose after the November 2, 1964, oral argument, we concluded that a further oral argument would be of assistance in resolving the remaining issues in this proceeding. That further argument, in which each of the nine remaining applicants participated, was held before the Commission, en banc, on May 22, 1967.[4]

5. Due to the dismissal of RAETA's application, the only issues remaining in dispute in this proceeding are those concerning Star's financial qualifications, Federal's technical qualifications with respect to its antenna site, and the standard comparison of the applicants. The examiner resolved the issues concerning Star and Federal in favor of those applicants. No exceptions have been filed to these findings and conclusions, and we adopt them as our own. We have reviewed the examiner's remaining findings of

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[3] Because of RAETA's specialized programing proposal, the standard comparative issue in this proceeding was enlarged to determine whether there were particular types or classes of programs for which there was an unfulfilled need in the Rochester area and the extent to which that need would be met by each applicant (FCC 62-385, released Apr. 13, 1962). Since, as noted above, RAETA's application has been dismissed and station WXXI has commenced operation, the evidentiary showings submitted with respect to RAETA's specialized proposal are now moot.

[4] Citizens filed a motion to correct the transcript of the May 22, 1967, oral argument on June 20, 1967. No objection to the motion has been filed, and it will be granted.

fact in the light of the applicants' exceptions, and it is our view that they are substantially accurate and complete. Accordingly, they are adopted with the modifications noted herein and in the appendix to this decision, where our rulings on the applicants' exceptions to the initial decision are set forth. Although the examiner proposed to grant the share-time proposal of RAETA and RTI, RAETA has withdrawn its application, and it is apparent that the findings in this proceeding now warrant substantially different conclusions and a different ultimate result.

II. PETITIONS FOR LEAVE TO AMEND

6. Before we consider the comparative qualifications of the remaining applicants, it will be of assistance to dispose of certain petitions for leave to amend applications which have been filed by several of the applicants. The substance and disposition of each pending petition is as follows:

(*a*) On June 2, 1967, Flower requested leave to amend its application to reflect that one of its stockholders, Harper Sibley, Jr., has acquired an interest in Empire Broadcasting Corp., which is the assignee in an application for assignment of license of station KLIV, San Jose, Calif. (files Nos. BTC-5315 and BAL-6044). No opposition to this petition has been filed, and it will be granted.[5]

(*b*) On May 18, 1967, Star requested leave to amend its application to reflect that: (1) None of its principals has any ownership interest in stations WBBF and WBBF-FM, Rochester, N.Y.; WGVA, Geneva, N.Y.; and WTLB, Utica, N.Y.; (2) five of its stockholders, Maurice R. Forman, Robert S. Kieve, James M. Tray-

[5] On Nov. 30, 1965, Flower notified us of the death of Louis A. Wehle, an 8.33-percent stockholder, and of the voluntary petition for bankruptcy filed by Paul E. McNamara, a 0.34-percent stockholder.

hern, Jr., Vincent A. Lopopolo, and Roy Wetzel, have acquired interests in Empire Broadcasting Corp., which is the assignee in an application for assignment of license of station KLIV, San Jose, Calif. (files Nos. BTC-5315 and BAL-6044); (3) three of its stockholders are connected with the University of Rochester, which owns stock in Harcourt, Brace & World, Inc., which, in turn, has filed an application for a new UHF television station in Rochester, N.Y. (file No. BPCT-3922);[6] (4) Robert S. Kieve and James M. Trayhern, Jr., have agreed, prior to moving to San Jose, to transfer portions of their interests in the applicant to Maurice R. Forman, thus reducing their stockholdings in the applicant to 5 and 2 percent, respectively; and (5) Maurice R. Forman has been elected a director of the Federal Reserve Bank of New York. No opposition to this petition has been filed, and it will be granted.

(*c*) On May 16, 1967, Community notified us that: (1) One of its stockholders, F. Robert Greene, is no longer connected with the application of WEXC, Inc., for a new standard broadcast station in Depew, N.Y. (docket No. 14031), which application has been dismissed by the Review Board (FCC 64R-314, released June 8, 1964); (2) the nonbroadcast business activities of F. Robert Greene have changed in certain respects; and (3) another of its stockholders, Michael R. Hanna, would completely sever his connection with Cornell University station WHCU, rather than merely taking a leave of absence from that position, in order to become Community's director of education and public affairs in the event of a grant of Community's application.

[6] By a public notice, dated June 27, 1967, we announced that the Harcourt, Brace & World, Inc., application for Rochester had been dismissed pursuant to sec. 1.568(a) of our rules. In addition, Harcourt, Brace & World, Inc., has returned the construction permits for new television stations in other communities, which it had previously obtained.

(*d*) On January 28, 1964, Heritage requested leave to amend its application to reflect the death of Roland G. McDonald, a 4-percent stockholder.[7] No opposition to this petition has been filed, and it will be granted. On October 22, 1964, Heritage requested leave to amend its application to reflect the death of James M. Landis, who was a joint tenant of a one-fourth undivided 2-percent interest in the applicant and to reflect the vesting of his interest in the surviving joint tenants, Justin N. Feldman, Lawrence H. Reilly, Jr., and George J. Solomon. No opposition to this petition has been filed, and it will also be granted.

(*e*) On November 29, 1965, RTI filed a petition requesting leave to amend its application to specify full-time instead of part-time, hours of operation and to alter its financing proposal. Oppositions were filed by Flower, Star, Federal, Citizens, and the Broadcast Bureau, and RTI filed a reply in response to those oppositions. Because it appeared that grant of RTI's petition would require an additional hearing and would further delay the resolution of this proceeding, we concluded that RTI's petition for leave to amend its application should be denied, FCC 66-593, released July 8, 1966. During the May 22, 1967, oral argument, RTI again requested leave to amend its application to specify full-time operation and argued that a further hear-

[7] This petition was dismissed in our order remanding this proceeding for a further hearing, FCC 65-403, released May 13, 1965, when the applicants were directed to submit such information as part of the overall up-dating of their proposals. However, Heritage failed to resubmit this request, and the remand order was subsequently set aside, FCC 66-347, released Apr. 21, 1966. Under these circumstances, it is appropriate to consider the merits of Heritage's Jan. 28, 1964, petition at this time. Similarly, a petition for leave to amend its application, filed by RAETA on June 24, 1964, was dismissed by the remand order, and the request was never resubmitted. In view of the dismissal of RAETA's application, this petition will be dismissed as moot.

ing would not be required since the initial decision contains complete findings of fact with respect to all of the applicant's principals. After further consideration, we are persuaded that the public interest would be better served by permitting RTI, without altering its comparative qualifications, to bring its proposal up to date so that this proceeding can be decided on the basis of the facts as they now exist. For this reason, we shall grant RTI's request for leave to amend its application to the extent of permitting it to specify full-time operation.

III. EVALUATION OF COMPARATIVE CRITERIA

A. Diversification of Control of the Media of Mass Communications

7. When the record was closed in this proceeding, Star, Community, and Federal each had substantial connections with other broadcast interests. As noted in paragraph 6, however, Star's principals have disposed of their interests in stations WBBF and WBBF-FM, Rochester, N.Y.; WGVA, Geneva, N.Y.; and WTLB, Utica, N.Y.;[8] and Community's stockholder, F. Robert Greene, is no longer connected with an application for a new standard broadcast station in Depew, N.Y. On the other hand, Federal continues to be connected with both station WSAY, Rochester, and station WNIA, Cheektowaga, N.Y. Federal is itself the licensee of WSAY and its 100 percent stockholder, Gordon P. Brown, is the licensee of WNIA, thus providing complete common control between the proposed television station and the two standard broadcast stations. Although

[8] Although both Star and Flower have amended their applications to reflect an ownership interest in the assignee of standard broadcast station KLIV in San Jose, Calif., by certain of their stockholders, we are not persuaded that such ownership interests should be given any significant weight in this proceeding; in view of KLIV's distance from Rochester and the less than controlling interests held.

WNIA, is located about 70 miles west of Rochester, WSAY is located in Rochester, where Federal's proposed television station would be located. Since none of the other applicants is otherwise associated with the media of mass communications to any significant extent,[9] we conclude that an equal preference must be given to each of those applicants over Federal on this very important criterion. While the weight of those preferences is diminished somewhat by the existence of other media of mass communications in the Rochester area, the preferences still must be considered substantial in this proceeding because each of those applicants would provide a new voice in the Rochester area. For these reasons, we conclude that each of the other applicants must be given a substantial preference over Federal with respect to the diversification of control of the media of mass communications.

B. Participation in Station Operation by Owners

8. On this important factor all of the applicants, with the exception of Genesee and Heritage, propose full-time participation by a substantial percentage of the stock ownership, but none, with the exception of Federal, proposes to have more than one-half of the ownership interest represented in full-time station operation. Genesee has no full-time participation by any person with an ownership interest and Heritage has almost none. Federal has 100 percent integration of ownership with management. In addition, Federal's participation is by a long-term local resident with many years of radio experience. Federal, therefore, is to be substantially preferred over the other applicants on this factor. Among the other parties with substantial integration, Flower ranks the highest, in view of the

[9] Under the circumstances of this proceeding, we are convinced that the facts with respect to Genesee's alleged connection with the Gannett Co., Main's connection with a common carrier service, and Citizen's connection with a local FM station are not sufficient to warrant an adverse conclusion as to any of these applicants.

broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser broadcast experience of Gordon Auchincloss II. We recognize that the integration of Flower is not accompanied by past local residence, and that in this respect it is not the equal of RTI, Star, Main, and Federal. However, in view of the fact that the great majority of Flower's stock is held by persons with area familiarity and the further fact that the great majority of its stock is also held by persons who will devote some time to the operation of the station, as is also true of most of the other applicants, we do not believe that in this particular case the absence of past local residence by the two stockholders participating full time in the operation of the station is so significant. In addition, as we noted in the *Policy Statement*, persons participating full time in station operation by definition will become local residents. In view of our conclusions, we do not believe further ranking of the other parties, some of whom are very close, is necessary on this issue.

C. Proposed Program Service

9. In view of our discussion with respect to this criterion in paragraph 3, supra, we are convinced that none of the applicants is entitled to a preference over any of the other applicants on the basis of its preparation and planning, its staffing, or its program policies and proposal.

D. Past Broadcast Record

10. Among the applicants, Star, Community, and Federal presented evidence with respect to the operation of broadcast stations in which their principals held an ownership interest.[10] In the *Policy Statement*, supra, we stated that a

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[10] Although Larson, who is a 10-percent stockholder in Flower, had an ownership interest in station KDYL–AM and KDYL–TV in Salt Lake City, Utah, during the period 1953-59, no exception was taken to the examiner's finding that the information in the record was not sufficiently comprehensive to form the basis for a judgment with respect to the operation of those stations.

past broadcast record within the bounds of average performance will be disregarded, since at least average future performance is expected. Thus, unless such a record is unusually good or unusually bad, it will not be given weight in the comparative analysis. The examiner's findings establish that both Star's and Federal's broadcast stations have adopted a music and news programing format. Although each has provided some local live programing and some non-entertainment programs, we are not persuaded that any of the stations has shown such an unusual degree of attention to the public's needs and interests as to establish an unusually good past broadcast record. In view of the average performance by each of these stations, we conclude that neither Star nor Federal is entitled to a preference over any of the other applicants with respect to this criterion.

11. On the other hand, Community has made a showing concerning the broadcast record of station WHAM during the period its 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station. At the time of WHAM's acquisition by Greene in 1956, the assignee proposed to limit entertainment programing to approximately 70 percent of the broadcast schedule. During the 1958 composite week, entertainment programing comprised only 62.4 percent of the broadcast schedule, live programing was broadcast 24.48 percent of the time and, except for discussion programs, the promised percentages in the nonentertainment categories were exceeded in every instance. Community's showing demonstrated that talks, interviews, and discussions on community issues and problems were carried on WHAM in several regularly scheduled entertainment and talk programs. In addition, WHAM carried regularly a weekday 5-minute commentary on local events and a 30-minute Sunday afternoon roundtable discussion of local projects and problems. In view of the facts that Greene was general manager and an owner of WHAM

during this period [11] and that Greene proposes to be active in a full-time supervisory capacity in Community's proposed station, we are convinced that Community must be given credit for the commendable record of performance compiled by WHAM while Greene was associated with it. For these reasons, we conclude that Community is entitled to a preference over all of the other applicants on the basis of its 15 percent stockholder's relationship to WHAM's past broadcast record.

E. Other Criteria

12. None of the applicants claims a preference with respect to the efficient use of this television channel, and, accordingly, we do not find any difference among the applicants with respect to this criterion. Although we have indicated that a comparative hearing should not be converted into a search for remote and insignificant blemishes on the applicants' reputation, the *Policy Statement* notes that substantial character deficiencies may warrant disqualification or a demerit in the comparative analysis. In this proceeding, the examiner made findings concerning the qualifications of Heritage's president, director, and 2 percent stockholder, Bernard P. Birnbaum. The record establishes that Birnbaum was chairman of the board of directors and one of four promoters of the Faradyne Electronics Corp. when the Securities & Exchange Commission suspended the effectiveness of two registration statements filed by the corporation. In support of its action, the Securities & Exchange Commission stated that the corporation had filed unreliable and materially false and misleading registration statements in an effort to raise public funds; most of which were to be used to make payments to the corpora-

[11] Although Greene retained his interest in WHAM and in two other stations for less than 3 years, we are not persuaded that such a fact should preclude consideration of the merits of WHAM's past broadcast record in our comparison of all the applicants.

tion's promoters pursuant to transactions either not revealed or described in deceptive terms. Although given an opportunity to show that he had no knowledge, responsibility, or involvement in these matters, Birnbaum merely stated that he never did any active work for the corporation. Under these circumstances, we are convinced that this must be considered to be a substantial reflection on Birnbaum's and Heritage's character qualifications, and that a comparative demerit must be assessed against Heritage because of Birnbaum's connection with the corporation's misconduct.

IV. CONCLUSION

13. We believe that the public interest would best be served by a grant to Flower. We conclude that no perferences are warranted with respect to the proposed program services and the efficient use of this television channel. In view of Birnbaum's connection with the Faradyne matter, we hold that a comparative demerit must be assessed against Heritage. We find no significant difference among the applicants on diversification of control of mass communications media, except that, as pointed out above, Federal has other broadcast interests, including station WSAY in Rochester. The other important factors involved in this case are participation in station operation by owners and past record. On participation we have preferred Federal with Flower second, and on past record have given a preference to Community above all of the other applicants. We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This superiority arises

from the experience factor. (We note that Community's participating stockholders also lack area familiarity.) We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community itself, but rather of a 15-percent stockholder (and proposed general manager) who was a 50 percent owner of the station whose record is involved. For the foregoing reasons we have determined to make the grant to Flower.

14. *Accordingly, it is ordered:*

(*a*) That the motions to correct the transcript of the November 2, 1964, oral argument, filed November 13, 1964, by Main; November 19, 1964, by both Flower and Star; November 24, 1964, by RTI; and November 25, 1964, by Community, *Are granted.*

(*b*) That the motion to correct the transcript of the May 22, 1967, oral argument, filed June 20, 1967, by Citizens, *Is granted.*

(*c*) That the petition for leave to amend its application, filed June 2, 1967, by Flower, *Is granted.*

(*d*) That the petition for leave to amend its application, filed May 18, 1967, by Star, *Is granted.*

(*e*) That the petitions for leave to amend its application, filed January 28 and October 22, 1964, by Heritage, *Are granted.*

(*f*) That the petition for leave to amend its application, filed on June 24, 1964, by RAETA, *Is dismissed* as moot.

(*g*) That the memorandum opinion and order (FCC 66-593, released July 8, 1966) *Is set aside* and that the petition for leave to amend its application, filed on November 29, 1965, by RTI, *Is granted* to the extent reflected in paragraph 6(e) of this decision.

(*h*) That the application of Flower City Television Corp., file No. BPCT-2929, for a construction permit for a new television broadcast station to operate on channel 13 in Rochester, N.Y., *Is granted;* and that each of the other applications designated in the caption of this decision *Is denied;* and

(*i*) That the construction authorized herein is subject to the condition that the ability of standard broadcast stations WBBF, WROC, WHEC, and WSAY to operate in accordance with the terms of their licenses shall not be adversely affected thereby, particularly with respect to their radiation patterns, and that at least five field intensity measurements on each radial established during the last proof of performance for each of these standard broadcast stations shall be submitted with the television application for license to prove that such patterns have not been materially affected.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

9 F.C.C. 2d

APPENDIX

RULINGS ON EXCEPTIONS TO THE INITIAL DECISION

EXCEPTIONS OF FLOWER CITY TELEVISION CORP.

Exception No.	*Ruling*
1-5, 7, 13-16, 28-46, 48-54, 56	Denied. The examiner's findings adequately and correctly reflect the record.
6	Granted. "Sixteen" is substituted for "six" in the first sentence of finding 22.
8-12, 92-95, 111-112, 122-123, 131-132, 135-136, 143, 145, 150-151, 166-170	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
17-27, 47, 55, 59-91, 96-110, 118-119, 129-130, 139-141, 147, 152, 154, 159, 162-165	Denied. These matters are moot in view of the dismissal of RAETA's application.
57-58, 114, 117, 157	Denied. See pars. 3 and 9 of our decision herein.
113, 115-116, 120-121, 124-128, 133, 142, 148, 158	Granted. See par. 5 of our decision herein.
134, 137-138, 144, 146, 149, 160-161	Granted to the extent reflected in our decision herein.
153	Denied. See footnote 9 to par. 7 of our decision herein.
155-156	Denied. See pars. 10 and 11 of our decision herein.

EXCEPTIONS OF GENESEE VALLEY TELEVISION CO., INC.

1-12, 36-42	Denied. The examiner's findings adequately and correctly reflect the record.
13, 63, 67	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
14-35, 43-47, 51-53, 71-73	Denied. See pars. 3 and 9 of our decision herein.
48-50, 56	Denied. These matters are moot in view of the dismissal of RAETA's application.
54-55, 57-62, 68	Granted. See par. 5 of our decision herein.
64-66, 69-70	Denied. See par. 8 of our decision herein.
74-75	Denied for the reasons set forth in our decision herein.

EXCEPTIONS OF ROCHESTER AREA EDUCATIONAL TELEVISION ASSOCIATION, INC.

1-54	Denied. These matters are moot in view of the dismissal of RAETA's application.

EXCEPTIONS OF STAR TELEVISION, INC.

1, 3-19, 21-39, 41-54, 57-58, 60-69, 71-82, 84-89	Denied. The examiner's findings adequately and correctly reflect the record.
2	Denied. This matter is moot. See pars. 6 and 7 of our decision.
20, 40	Denied. The challenged actions were correct.
55-56, 59, 70, 90	Denied as not of decisional significance.
83, 91-130	Denied. These matters are moot in light of the dismissal of RAETA's application.

Exception No.	*Ruling*
Exceptions to Conclusions	
1	Granted. See par. 5 of our decision herein.
2-5, 12	Denied. These matters are moot in view of the dismissal of RAETA's application.
6-7	Denied. See par. 8 of our decision herein.
8-11	Denied. See pars. 3 and 9 of our decision herein.
13	Denied for the reasons set forth in our decision herein.
EXCEPTIONS OF COMMUNITY BROADCASTING, INC.	
A-1 to A-2, B-1 to B-23, C-1, C-4 to C-8, C-10 to C-15, D-1, D-7 to D-8	Denied. The examiner's findings adequately and correctly reflect the record.
B-24	Denied. The examiner was correct in holding that the past broadcast record of stations WHCU and WHCU-FM is immaterial since Hanna had no ownership interest in those stations.
C-2, D-5 to D-6	Granted. The clauses are deleted.
C-3, D-3 to D-4	Denied. The examiner's reasoning is correct.
C-9, D-2, D-9 to D-12	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
E-1 to E-23, F-1(f), F-1(l)	Denied. These matters are moot in view of the dismissal of RAETA's application.
F-1(a) to (d), F-1(g), F-1(j) to (k), F-1(m) to (n)	Granted. See par. 5 of our decision herein.
F-1(e)	Denied. See footnote 9 to par. 7 of our decision herein.
F-1(h) to (i)	Denied. See pars. 3 and 9 of our decision herein.
F-2	Granted to the extent reflected in our decision herein and denied in all other respects for the reasons stated in our decision herein.
EXCEPTIONS OF HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.	
1-4, 14, 16-19, 23, 26	Denied. The examiner's findings are correct and are supported by the record.
5, 11-13, 15, 24-25	Denied. The examiner's findings adequately and correctly reflect the record.
6-10, 27-49, 60	Denied. These matters are moot in view of the dismissal of RAETA's application.
20-22	Denied. The requested adverse findings are immaterial in light of our decision herein.
50-54(3), 57	Granted. See par. 5 of our decision herein.
54(4)-55	Denied. See par. 8 of our decision herein.
56	Denied. See pars. 3 and 9 of our decision herein.
58-59, 61	Denied for the reasons set forth in our decision herein.
EXCEPTIONS OF MAIN BROADCAST CO., INC.	
1-32	Denied. The examiner's findings adequately and correctly reflect the record.
33-39, 51-53, 70	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
40-50, 75	Denied. These matters are moot in view of the dismissal of RAETA's application.
54-58	Granted. See par. 5 of our decision herein.
59-66	Denied. See par. 8 of our decision herein.
67-69, 71-73	Denied. See pars. 3 and 9 of our decision herein.
74, 76	Denied for the reasons set forth in our decision herein.

Exception No.	*Ruling*
EXCEPTIONS OF FEDERAL BROADCASTING SYSTEM, INC.	
1	Denied. The examiner's ruling is correct.
2-9	Denied. The examiner's findings adequately and correctly reflect the record.
10, 12-14	Granted. See par. 5 of our decision herein.
11	Denied. These matters are moot in view of the dismissal of RAETA's application.
15-18	Granted to the extent reflected in par. 8 of our decision herein.
19-22, 24	Denied. The requested adverse conclusions are immaterial in light of our decision herein.
23	Granted to the extent reflected in par. 10 of our decision herein.
25	Denied for the reasons set forth in our decision herein.
EXCEPTIONS OF CITIZENS TELEVISION CORP.	
1, 3, 7-14, 21, 22, 26, 28-30, 32-36, 56	Denied. The examiner's findings adequately and correctly reflect the record.
2, 4, 5, 15, 23-25, 27, 31	Denied for failure to comply with sec. 1.277(a) of the Commission's rules.
6	Denied as not of decisional significance.
16-20, 37-54, 65-66, 71	Denied as moot in view of the dismissal of RAETA's application.
55, 72	Denied. See our entire decision herein.
57-61, 63-64	Denied in substance. See pars. 3, 8, and 9 of our decision.
62, 68, 69	Denied in substance. See pars. 10 and 11 of our decision.
67	Denied in part and granted in part. See par. 7 of our decision.
70	Granted in substance as to 70(c) and otherwise denied. See par. 12, also 10 and 11 of our decision and the ruling, supra, on exception 16 of Citizens Television Corp.
EXCEPTIONS OF ROCHESTER TELECASTERS, INC.	
1	Granted in substance. See par. 8 of our decision herein.
2	Denied. See footnote 9 to par. 7 of our decision herein.

Dissenting Statement of Commissioner Robert T. Bartley

In this decision, the Flower application is not preferred in any of the six comparative criteria, yet it is granted and the other nine applications are denied.

I dissent and vote to grant the application of the Federal Broadcasting System, Inc.

The majority decision awarded a substantial preference to Federal in the comparative criterion of "participation in station operation by owners." There can be no argument with that finding. Federal is the only applicant herein having 100 percent integration of ownership with management, and that is by a long-term local resident with many years of radio experience. In terms of the likelihood of effectuation of proposals, greater certainty lies, I believe, with an applicant whose knowledge of local needs is brought to the day-to-day management and operation of the station. Gordon Brown, Federal's sole stockholder, would devote 40 hours per week as general manager. With his lifetime residence in Rochester, his long association in the broadcasting industry, and his operation of a radio station (WSAY) in Rochester for many years, Gordon Brown (Federal), of all of the applicants herein, makes the most convincing showing that the views of the locally oriented ownership would be directly translated into the daily operation of the station and that the licensee would remain aware of and responsive to community needs on a continuing basis. None of the other applicants herein proposes to have more than one-half of the ownership interest represented in full-time station operation.

I disagree further with the finding in the majority's decision that Flower ranks second to Federal in the criterion of "participation in station operation by owners." As the decision seems to admit, the fact that most of the Flower stock is held by persons with area familiarity and by per-

sons who will devote some time to the operation of the station is also true of most of the other applicants. Thus, Flower should be rated equal to, and not superior to, applicants other than Federal.

The majority decision awards each of the other applicants a substantial preference over Federal on the comparative criterion of "diversification of control of the media of mass communications" because Federal is the licensee of WSAY, Rochester, and its 100 percent stockholder, Gordon P. Brown, is the licensee of WNIA, Cheektowaga, N.Y. The weight of those preferences is diminished substantially, in my opinion, by the existence of 16 broadcast stations licensed in Rochester (six AM, seven FM, three TV, including channel 13). I agree that, as set forth in our *Policy Statement on Comparative Broadcast Hearing,* diversification of control of media of mass communications is a primary factor in comparative considerations. However, it is my position that, in diversification of control of media, a licensee's facilities, i.e., AM, FM, TV, make up a broadcast unit. As technical advancements were made, and an AM licensee added FM and TV to enhance its broadcast service in the community, I believe the public interest was benefited. Thus, I find generally that a proposal to add a facility to such a locally oriented unit is in the public interest and not subject to demerit per se. See my concurring statement in *Peoples Broadcasting Corp.,* docket No. 15619 (May 19, 1967). The majority here states that the preferences to the other applicants "must be considered substantial in this proceeding because each of those applicants would provide a 'new voice' in the Rochester area." I disagree. I believe that more basic than the matter of a "new voice" is the quality of the "voice" that is added to the area.

In my evaluation, the preference of each applicant over Federal on diversification of control of mass media is reduced from substantial to slight, and Flower's second place

to Federal is reduced to equal status with the applicants other than Federal.

With Flower receiving no preference in any of the comparative criteria, even pursuant to the majority decision, I believe that a grant is not supported. As indicated above, I believe that the preference for Federal is decisive and that its application should be granted in the public interest.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

I have indicated before my concern that the comparative hearing process is a thoroughly unsatisfactory way to award valuable broadcast properties. *Farragut Television Corp.*, 8 F.C.C. 2d 279, 285 (1967) (dissenting statement). No better example could be chosen to demonstrate this than the case which the Commission decides today.

At stake is a Rochester, N.Y., VHF station which will likely be worth about $4 million as soon as it is operating with a 3-year license and a network affiliation. Thus, understandably, there are nine contenders in the ring battling for the construction permit after which the award of a regular license is a formality.

First, the case is an example of the intolerable delay which can accompany the comparative process. Designation for hearing was on November 15, 1961. Further appeals seem likely, and remand and further hearings are, at least, possible. But, even if the present decision survives appeal, the case will have taken 6 years for resolution.

But more fundamentally disturbing than the delay is the unsatisfactory result which the Commission eventually reaches. The point is not that I would award the construction permit to a different applicant than has the Commission. I would, but my preference is not a strong one, and the Commission's choice is quite satisfactory. The point is that there is so little in the way of significant

differences among most of the nine applicants that the extraordinary marathon conducted by the Commission and the applicants has produced no more satisfactory result than would a drawing from a hat.

The Commission's choice to run this Rochester station is Flower City Television Corp. Flower is chosen over the eight other applicants because it ranks second in what we call the "integration of ownership and management" (and the majority here calls "participation in station operation by owners"). The first in this regard, Federal Broadcasting System, Inc., unlike Flower, has a substantial detriment on other grounds. But it is clear that the preference for Flower over the other applicants on "integration" cannot be very great. Less than 20 percent of Flower's stock is held by persons intending to participate in station affairs on a full-time basis. Federal's one stockholder will be active in station affairs on a full-time basis, and four other applicants have more full-time integration than Flower. The majority is able to point to other related facts to bolster Flower's position on integration. Almost 80 percent of its shareholders will devote some time to the station, but four of the other candidates exceed Flower in this showing. The majority also points to Flower's stockholders who are familiar with the Rochester area, but none of these plan full-time devotion to station affairs, and as much area familiarity is also found in several of the other applicants. Likewise, Flower's percentage of fully "integrated" shareholders with broadcast experience, also alluded to by the majority, is exceeded by several of the other applicants.

It may well be that, by combining all these factors and calling them by the undescriptive title "integration of ownership and management" or "participation in station operation by owners," it is possible to conclude that Flower ranks second to Federal on this criterion for selection. But it is quite clear that the choice is not a certain one,

and that the Commission might, with a colorable justification, have chosen a number of the other applicants over Flower.

Although Federal clearly excels in the "integration" showing, I would have to agree with the Commission that it should not be awarded this station. Federal is the only applicant which already controls a Rochester broadcasting station. I attach great importance to diversifying control of broadcast media both in the country and in individual communities. Thus, I cannot agree with Commissioner Bartley that a licensee should be allowed an AM, an FM, and a TV station in any community before he receives a diversification demerit. On the contrary, local diversification seems even more important to me than national diversification.

Forced to vote for one of these nine applicants, I would choose Community Broadcasting, Inc. Community ranks well down the list in the integration factor. But, as the Commission notes, it deserves a preference for its past broadcast record, because its proposed general manager and significant stockholder has a commendable record.

I do not make this judgment confidently, for it appears to me impossible to make meaningful distinctions between applicants with such insignificant and noncomparable differences. The comparative process for selection of broadcasting licensees is a sad commentary on the American administrative process. The basic bankruptcy of the approach and the absence of any correlation between the results reached and any discernible policy has been demonstrated long ago. I am neither the first to feel or to say this, yet neither Congress nor this Commission has made necessary moves to change the process—a change which is long overdue.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re Applications of FLOWER CITY TELEVISION CORP., ROCHESTER, N.Y., ET AL. For Construction Permits for New Television Broadcast Stations (Channel 13)	Dockets Nos. 14394, 14395, 14460, 14461, 14462, 14464, 14465, 14466, 14467, 14468 File No. BPCT-2929

Memorandum Opinion and Order

(Adopted November 22, 1967)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX NOT PARTICIPATING; COMMISSIONER JOHNSON DISSENTING.

1. This proceeding involves 10 mutually exclusive applications for construction permits for a new television station to operate on channel 13 in Rochester, N.Y. By our decision (FCC 67-924, 9 FCC 2d 249), released August 3, 1967, we granted the application of Flower City Television Corp. Seven of the nine remaining applicants, Genesee Valley Television Co., Inc., Community Broadcasting, Inc.,[1] Heritage Radio & Television Broadcasting Co., Inc., Main Broadcast Co., Inc., the Federal Broadcasting System, Inc., Citizens Television Corp., and Rochester Telecasters, Inc., have now filed petitions for reconsideration of that decision. Oppositions to those petitions were filed by Flower and the Broadcast Bureau, and replies to the oppositions were filed by Community, Main, and Citizens.

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[1] Because its petition for reconsideration exceeds our limitation on such pleadings by one-third of a page, Community filed a request for acceptance of its petition for reconsideration on Sept. 5, 1967. No opposition has been filed to Community's request. In view of the de minimis nature of Community's violation, its petition for reconsideration will be accepted.

2. In our decision, we held that each of the other applicants must be given a substantial preference over Federal with respect to the diversification of control of the media of mass communications criterion due to Federal's connection with stations WSAY, Rochester, and WNIA, Cheektowaga, N.Y. Federal was given a substantial preference over all of the other applicants for its participation in station operation by owners because of the full-time integration of its 100 percent owner, Gordon P. Brown, but Flower was preferred over all remaining applicants in view of the extensive broadcasting, and particularly television, experience of G. Bennett Larson, and the somewhat lesser broadcast experience of Gordon Auchincloss II. While some other applicants had greater degrees of integrated local residence, we noted that the significance of the absence of past local residence by Flower's two fully integrated stockholders was diminished by the facts that the great majority of Flower's stock is held by local residents and that the great majority of its stockholders will devote some time to the operation of the station. We also held that Community was entitled to a preference over all of the other applicants for the commendable past broadcast record of station WHAM, Rochester, when Community's 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station.

3. In conclusion, we stated that Flower was preferred over Federal, since the public interest in a television station in Rochester, which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We also preferred Flower over Community, whose integrated stockholders also lack area familiarity, because of the former's superiority, arising from the experience factor, in the area of participation in station operation by owners. While Community's past broadcast record was commendable, we held that it was not so outstanding as to warrant

substantial weight, since it was not the past record of Community, itself, but rather that of its 15 percent stockholder and proposed general manager. Thus, we concluded that the public interest would be best served by a grant to Flower.

4. Some of the instant petitioners have advanced the threshold contention that there has been no valid initial decision in this proceeding; that they have been deprived of their right to file exceptions to a proper initial decision; and that our decision is, therefore, procedurally defective. They urge that the failure of Presiding Examiner Annie Neal Huntting to rank each of the losing applicants under the comparative criteria and the dismissal of the application of the Rochester Area Educational Television Association, 2 FCC 2d 448 and 1029 (1966), render invalid the initial decision which was released in this proceeding. We are convinced that these contentions are entirely without merit. The initial decision prepared by Examiner Huntting made exhaustive findings of fact with respect to each applicant's showing under all of the comparative criteria, and included ample conclusions of law and a comparative analysis of each of the applicants.

5. It is clear that the initial decision complies with all of the requirements of the Administrative Procedure Act and of our regulations, since it included a statement of findings and conclusions, as well as the reasons or basis therefor, upon all issues of law and fact; since the parties were fully informed of the issues and proposed grounds of the decision; and since the initial decision was susceptible when it was released of becoming final Commission action. Under secton 1.276 of our rules, the initial decision in this proceeding was precluded from becoming a final action by the exceptions which were filed long before RAETA's application was dismissed, so that the latter action could not have deprived the initial decision of the validity which it had when it was released. It is also clear

that each of the applicants filed extensive exceptions to the initial decision, obviously demonstrating that the parties had been fully informed of the issues and the proposed grounds of the decision.

6. While the exceptions of some of the applicants objected to the examiner's failure to rank all of the losing applicants among themselves in claiming that their proposals should be granted, none of the applicants argued then or at any time prior to the oral argument of May 22, 1967, that it was necessary to remand this proceeding for the preparation of a new initial decision. Indeed, as late as March 27, 1967, the applicants, which now claim that our final decision is procedurally defective, joined in a petition urging us to resolve this proceeding by issuing such a decision. In view of all of these facts and circumstances and the further fact that each of the applicants' extensive exceptions was considered in detail, we are convinced that none of the applicants in this proceeding has been deprived of any procedural right and that these contentions must be rejected.

7. In other respects the petitions for reconsideration which have been filed in this proceeding are substantially devoted to a further analysis of the reasons why each petitioner's application should be granted.[2] Since each of the

[2] In connection with its claim that its application should be granted, Citizens, on Sept. 5, 1967, filed a petition for leave to amend, requesting us to accept its amendment in which its 10 percent stockholder, William A. Fay, would commit himself to devote his full time to Citizens' proposed station. Citizens contends that the amendment is consistent with Fay's original commitment to devote at least 15 hours weekly and full time if necessary and that due process requires acceptance of the amendment, since Community's request to improve its integration proposal was granted. Flower opposes Citizens' petition, urging that it is a blatant attempt to secure an advantage in this comparative proceeding and that it would require a further hearing to permit cross-examination of Fay if the amendment were granted. We agree

petitioners merely relies upon its own evaluation of the comparative qualifications of each of the applicants, we are not persuaded that any useful purpose would be served by a further summary of those contentions. As is apparent from our decision, there are a number of outstanding applicants in this proceeding, and it has been very difficult to select the one applicant that is superior to all of the others. However, one of those applicants must be chosen to be the licensee of this Rochester television station and, thus, the problem in this extremely close proceeding has been to determine which of the applicants is the best. In furtherance of that purpose, we have permitted the parties to present oral argument on two different occasions,[3] and we have given lengthy and detailed consideration to the applicants' views which they have presented in their arguments, in their exceptions, and in their briefs.

8. The petitioners are once again arguing that their versions of the facts require grant of their respective

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with Flower that Citizens' petition should be denied. Citizens' request is an undisguised attempt, long after the record has been closed, and even after the final decision was issued, to improve its comparative posture to the detriment of the other applicants in this proceeding. Citizens' petition must be denied, since the other applicants would be entitled to a further hearing to test Citizens' improved proposal and since there is no justification for the gross delinquency with which this proposed modification has been filed. For these same reasons, no weight can be given to the events occurring after the close of this record, which Citizens now relies on in its petition for reconsideration. Citizens is in error when it contends that we granted Community's request to improve its integration proposal. Although par. 6(c) of our decision recites that Community had notified us of certain facts with respect to its stockholder, Michael R. Hanna, those facts could not be, and were not, given any weight in our comparative evaluation of the applicants in this proceeding.

[3] Although some of the petitioners have again requested oral argument in connection with the present pleadings, we are persuaded that each of the applicants has had ample opportunity to make an oral presentation of its views in this proceeding.

proposals for essentially the same reasons that they have been urging throughout this proceeding. It is clear that rehearing will not be granted merely for the purpose of again debating matters which we have fully considered. See *WWIZ, Inc.*, 37 FCC 685 (1964). Nonetheless, while we concluded that Flower's application should be granted only after exhaustive consideration of this record and thorough analysis of the comparative qualifications of each of the applicants, we have again reviewed our decision in light of petitioner's present contentions and we are convinced that they have presented no reason which warrants a departure from the findings [4] and conclusions contained in that decision. Under these circumstances, we remain convinced that the public interest will be best served by a grant of Flower's application and, thus, the petitions for reconsideration of that determination must be denied.

9. Accordingly, *It is ordered:* (*a*) That the request for acceptance of petition for reconsideration, filed on September 5, 1967, by Community Broadcasting, Inc., *Is granted;* (*b*) that the petition for leave to amend, filed on September 5, 1967, by Citizens Television Corp., *Is denied;* and (*c*) that the petitions for reconsideration, filed on September 5, 1967, by Genesee Valley Television Co., Inc., Community Broadcasting, Inc., Heritage Radio & Television Co., Inc., Main Broadcast Co., Inc., the Federal

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[4] Citizens asserts that we have failed to resolve the problem raised by its exception No. 8 concerning the past broadcast records of stations WHAM, WHFM, and WHAM-TV, Rochester, while Citizens' stockholder, William A. Fay, was a 1-percent stockholder of those stations. While our ruling that the examiner's findings adequately and correctly reflect the record resulted from the ambiguity with which Citizens' exception was stated and from Citizens' failure to claim any preference in its exceptions to the examiner's conclusions, that ruling need not be revised, since our ruling on Community's exception No. C-3, which involves the same portions of the initial decision, clearly disposes of Citizens' present argument.

Broadcasting System, Inc., and Citizens Television Corp.; and on September 1, 1967, by Rochester Telecasters, Inc., *Are denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I would grant reconsideration and, for the reasons set forth in my statement with the decision, released August 3, 1967, herein (9 FCC 2d 249), grant the application of the Federal Broadcasting System, Inc.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,277

STAR TELEVISION, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,541

COMMUNITY BROADCASTING, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,542

CITIZENS TELEVISION CORP., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,543

FEDERAL BROADCASTING SYSTEM, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,544

HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,545

GENESEE VALLEY TELEVISION CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,546

MAIN BROADCAST CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,547

ROCHESTER TELECASTERS, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

Appeals From a Decision and Order of the Federal Communications Commission

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Decided January 30, 1969

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Before PRETTYMAN, *Senior Circuit Judge,* and BURGER and LEVENTHAL, *Circuit Judges.*

PRETTYMAN, *Senior Circuit Judge:* These are appeals from a decision and order of the Federal Communications Commission, in which the Commission awarded a construction permit for a television broadcast station on Channel 13 at Rochester, New York. There are eight appellants in as many appeals, consolidated. The appeals are from a

Decision[1] and a Memorandum Opinion and Order[2] in which reconsideration was denied.

The case was enormously complicated and tedious. The channel was newly allocated to this location. Twelve applicants filed, and their applications were referred to an examiner for comparative hearing and decision. Her findings of fact in the consolidated proceeding were 253 finely printed pages in length. The applicant to which she recommended a grant (a combination of two applicants on a share-time basis) withdrew its application. Whereupon the Commission remanded, then withdrew the remand, held further oral arguments, rendered a decision in which it adopted the examiner's findings, made further findings, and rendered an award.

Appellants say the Commission failed to resolve all the issues raised by them, violated its policy statement in a number of respects, failed to give weight to certain derelictions or shortages of the successful grantee, ignored uncontradicted evidence, acted arbitrarily, did not apply the comparative criteria to all applicants—a total of sixteen points. They argue, *inter alia,* that, when the application of the initially successful grantee was withdrawn, the entire initial decision became meaningless and so the parties have been deprived of their right to have an examiner "pass upon their proposed findings and conclusions addressed to the factual situation as it actually exists." The last-stated contention is obviously untenable. Basic facts do not derive their characteristics from the conclusion one may draw from them. If the conclusion be changed, the underlying facts are not thereby changed. Even if the conclusion be withdrawn, the facts remain facts, and if they were correctly found the findings remain unchanged. In addition to this consideration on the point

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[1] Flower City Television Corp., et al., 9 F.C.C.2d 249 (1967).

[2] 10 F.C.C.2d 718 (1967).

made by appellants, we note there was a reargument of the case after the withdrawal of the initially successful applicants.

We think we need not discuss any of the other contentions, with one exception. The noteworthy phase of the dispute concerns principally the procedural requirements in a decision in a comparative case. The Commission had developed guidelines, which it called "criteria" and which it used for comparative measurement purposes. In the course of usage these criteria acquired names. Thus, some of them are Area Familiarity, Integration of Ownership and Management, Broadcast Experience, Diversification of Control of Mass Media, etc. In the midst of the present proceeding the Commission published a "policy statement", in which, with vigorous internal discussion and difference of opinion but with considerable flexibility in the result, it discussed some criteria at length, others summarily, and described the policies it intended to follow in making comparative decisions.[3]

The reasoning of the Commission in the matter at bar may be a bit circuitous, but it is clear and amply supported by findings of fact and by the evidence. We pointed out in *Johnston Broadcasting Co.* v. *FCC*[4] the decisional process to be followed in disputes of fact. We said there should first be findings of basic facts, based directly on evidence; then there should be findings of ultimate facts, which are drawn from the basic facts; and then a conclusion should be given, based on the ultimate facts. In this concept of the process the basic facts should be drawn, at least initially, by the examiner, if there be one, since it is he who sees and hears the witnesses. In that opinion we said:

> "(5) Findings must be made in respect to every difference, except those which are frivolous or wholly un-

[3] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965).

[4] 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

substantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."[5]

This latter clause did not mean, as appellants seem to contend, that the Commission must reach and state a comparison between each pair of applicants in respect to each criterion.[6] It meant findings in respect to each applicant as to every point of comparison suggested by a party, and then a composite consideration.

The Commission stated, clearly and emphatically, that it preferred Flower over all other applicants on the basis of broadcast experience. When a finding of preference "over all other applicants" is thus made, it is unnecessary to name separately each other applicant. In the case at bar a reading of the findings respecting the broadcasting experience of the several people scheduled to be in the management of each of the applicants shows clearly the reason for the preference of Flower on the point. The Commission, with all the facts before it in detailed findings, exercised a judgment which it was empowered to make. The basis for the choice is clear in the basic findings.

For reasons which it stated, the Commission gave each of the other applicants otherwise associated with the media of mass communication a substantial preference over Federal on that criterion (Diversification of Control of Media of Mass Communication). In respect to Participation in Station Operation by Owners (Integration of Ownership and

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[5] Id. at 46, 175 F.2d at 357.

[6] Such a task would be burdensome to the point of the ridiculous in some cases, as in the present one. To compare each of eight applicants with each other applicant in respect to each of eight criteria would require 224 comparisons, according to our combinatorial analysis.

Management), Federal was substantially preferred over the other applicants, and among the other applicants Flower was ranked highest on this point. The Commission found no preference in respect to Proposed Program Service. In respect to the criterion Past Broadcast Service (the operation of broadcast stations in which the present applicants' principals held an ownership interest), three applicants presented evidence. The Commission gave a preference to one (Community) on this point and denied any to the other two. The Commission awarded a demerit to one applicant on account of a character deficiency of one of its officers. Upon the basis of the preferences thus awarded, and the demerit, the Commission had remaining for final comparison three applicants—Federal, Flower and Community. It preferred Flower to Federal because of the latter's existing radio stations. It preferred Flower to Community because of Flower's superiority in participation in station operation (*i.e.*, integration of ownership and management). It found this superiority not because the owners of Flower planned a greater amount of participation in its management but because they were much more and better experienced than were the owner-managers of Community. A reading of the detailed findings concerning the experience of each of the people involved shows clearly the grounds upon which the Commission made this finding.[7] We must keep in mind that we are not choosing a grantee. Our function has been described many times: We must understand the processes pursued by the Commission and test the validity of both the process and the conclusion.

We find no fault necessitating reversal.

Affirmed.

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[7] The findings as to the personnel of Flower involved in this problem will be found in the *Flower City Television* decision, *supra* note 1, at 269, those of Community at 295, and those of Citizens at 322.

LEVENTHAL, *Circuit Judge, dissenting:* In view of all the time that has elapsed and paper that has been lodged, it is with some diffidence that I demur from this court's affirmance of the award by the Federal Communications Commission to Flower City Television Corporation (Flower) of the license for TV Channel 13, Rochester, New York. But I think the findings fail to support the order, in that the Commission failed to set forth its reasons for preferring Flower to Community Broadcasting Company (Community) and Citizens Broadcasting Company (Citizens). In my view sound principles of administrative law and judicial review require remand to the Commission.

I

It was in August 1961 that Channel 13, a VHF channel, was assigned to the area of Rochester, New York, sometimes called the Flower City. After applications to operate the channel were duly filed, a comparative hearing began in June 1962. It ended in December 1962. In January 1964 the Hearing Examiner filed an Initial Decision which included extensive findings. Without commenting on the qualifications of each applicant, except to note them, the Examiner, persuaded by the advantage of establishing an educational broadcast service in the area, decided upon an award to Rochester Area Educational Television Association, Inc. (RAETA) and Rochester Telecasters, Inc.[1]

On the basis of exceptions from other applicants, and an objection filed in amicus form by ABC, the Commission in May 1965 entered an order that reopened the record to explore, *inter alia*, the impact of a possible grant to RAETA on the objective of a competitive third network serv-

[1] These two applicants had proposed a share-time operation of channel 13 and their applications were treated as a single proposal. RAETA was to use the channel as a non-commercial educational station, and RTI was to use the balance of the time as a commercial ABC network affiliate.

ice.[2] At the same time each applicant was given the opportunity of bringing its application up to date to reflect involuntary changes and programming changes occasioned by changed needs of the community. The applicants entered into a series of negotiations, culminating in RAETA's withdrawal of its application.[3]

Meanwhile, on July 28, 1965, the FCC issued its *Policy Statement on Comparative Broadcast Hearings.*[4] On the withdrawal of RAETA the Commission determined that the instant proceeding could be decided on the basis of the record before the Examiner without further evidentiary submission and it vacated the remand. A second oral argument was held before the Commission on May 22, 1967, affording the parties another opportunity to focus on the relevant points in the record. The parties did not object to this procedure.

In making the award to Flower on August 3, 1967, five years after the hearing, the Commission adopted the Examiner's findings of fact but said that in view of RAETA's withdrawal "it is apparent that the findings in this proceeding now warrant substantially different conclusions and a different ultimate result."[5]

The Commission's opinion undertook to apply the criteria of its 1965 Policy Statement which set forth the criteria governing comparative hearings in regard to all fu-

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[2] Memoranda opinions and Order, FCC 65-403, released May 13, 1965.

[3] RAETA now operates Station WXXI in Rochester, a UHF educational channel.

[4] 1 F.C.C. 2d 393 (1965).

[5] *Decision,* August 3, 1967, Application of Flower City Television Corp., FCC 67-924, 9 F.C.C. 2d 249, at 252. Reconsideration was denied by Memorandum Opinion and Order, 10 F.C.C. 2d 718 (Nov. 22, 1967). Commissioner Bartley and Commissioner Johnson dissented separately.

ture licensing orders.[6] Under three of the categories of criteria the Commission found explicitly that as between Flower, Community, and Citizens, none of them should be ranked preferentially. In connection with *Past Broadcast Record* Community was singled out for preference because of its "commendable record." In the area of *Participation in Station Operation by Owners,* Flower was ranked second after Federal. Flower's relatively high ranking here turned out to be crucial. The Commission concluded that the award should go to Flower despite Community's edge in *Past Broadcast Record.*

While the record suffices to show that Flower seems to be a satisfactory licensee, I think a remand is required because the Commission has failed adequately to justify its preference for the experience of Flower's participating owners, as opposed to that of the principals of Citizens and Community.

II

This court has consistently insisted on adequate findings and explanation in support of administrative decisions. In a careful opinion the court set forth the relevant criteria, with specific reference to the requirements for findings issued after comparative hearings:[7]

> (1) The bases or reasons for final conclusions must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found

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[6] The categories are: *Diversification and Control of Media of Mass Communications; Full-Time Participation in Station Operation by Owners; Proposed Program Service; Past Broadcast Record; Efficient Use of Frequency; Character; Other Criteria.*

[7] Johnston Broadcasting Co. v. FCC, 85 U.S.App.D.C. 40, 46, 175 F.2d 351, 357 (1949).

must appear as rational inferences from the findings of basic fact. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant.

The Commission's findings do set forth the bare bones facts of the nature and extent of the broadcast experience of the principals involved.[8] What is lacking is the critical

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[8] These findings, set forth in the Examiner's findings of fact, and adopted by the Commission may be summarized as follows:

FLOWER 9 F.C.C. 2d at 268-69.

Larson: 1926 - announcer and program director at Salt Lake City radio station; 1929 - producer-director for NBC radio network in New York; 1934 - independent radio producer; 1942 - 20% owner and general manager of District of Columbia radio station; 1945 - vice president and general manager for radio and television operations of the Philadelphia Bulletin; supervised application for and construction of Philadelphia TV station while television operations supervisor for Philadelphia Bulletin; 1953-1959 - President, general manager, and 20% owner of Salt Lake City radio-TV station.

Auchincloss: 1934 (at age 17) - summer job as announcer for Asbury Park radio station. Since 1943, he has been an independent writer, director, and producer in radio, television, and other fields.

CITIZENS 9 F.C.C. 2d at 322-25.

Fay: 1927 - studio manager at Buffalo radio station; 1928-1957 - general manager and officer of Rochester radio-TV station (TV since 1949).

Fraiberg: 1949 - sales manager and programming for San Francisco TV station; 1959 - assistant to vice president in

feature of justification or analysis explaining why the Commission deemed the background of Flower's executives to be preferable.

I do not for a moment suggest that the Commission must dot every "i" and cross every "t" in its conclusions. It is enough if a court can "discern the path" followed by the Commission.[9] And I *can* discern the path by which the Commission disposed of the applicants other than Citizens and Community. The Commission's reasons for rejecting Federal, Genesee and Heritage on grounds other than broadcast experience were amply stated, based on considerations that were within the purview of the Policy Statement, and supported by the record. As to Star, Main and RTI, the Examiner's basic findings make it reasonably clear to me that these applicants were substantially deficient in television broadcast experience as compared with Flower, Citizens or Community.

Agencies should not be compelled to labor the obvious.[10] Certainly the Commission is not required to formulate a comparison between each pair of applicants for each cri-

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charge of television, Metropolitan Broadcasting Co. (Metromedia); 1963 - general manager of District of Columbia television station (now manager of WNEW-TV in New York).

COMMUNITY 9 F.C.C. 2d at 295-301.

Greene: 1934 - account executive of Buffalo radio stations; 1946 - national sales manager for Buffalo radio station; 1953 - assistant general manager of Buffalo radio station; co-owner of radio stations in North Carolina and Colorado; 1956 - co-owner and general manager of Rochester radio station.

Hanna: 1940-present - general manager of Cornell University AM-FM radio station.

[9] *See* Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 595 (1945).

[10] See my dissent in MG-TV Broadcasting Co. v. FCC, D.C. Cir. No. 21224, Dec. 20, 1968.

terion. A certain summariness of treatment is acceptable and necessary for relatively insubstantial matters. I do not quarrel with Judge Prettyman's observation in that context.

When we come to the issue of prior broadcast experience, however, we are manifestly concerned with a critical aspect of the hearing and decisional process, and the Commission cannot rely on bare conclusions without supporting findings unless the existence and content of those findings are virtually manifest.

Flower was rated superior in "participation in station operation by owners" to all applicants other than Federal (which was downgraded on the diversification criterion). What was the basis of that preferential rating? To borrow Commissioner Bartley's words, the Commission's decision virtually admits that "the fact that most of the Flower stock is held by persons with area familiarity and by persons who will devote some time to the operation of the station is also true of most of the other applicants."[11] The majority of this court accordingly projects that Flower's preference on this criterion rests not on a greater amount of owner participation in management, but on the fact that Flower's owner-managers were much more and better experienced than those of the other applicants.

Let us begin by comparing Flower and Citizens—reserving discussion of Community because that involves still another serious problem with the findings. All the Commission says is: "Among the other parties with substantial integration, Flower ranks the highest, in view of the broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser experience of Gordon Auchincloss II."[12]

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[11] 9 F.C.C. 2d at 261.

[12] 9 F.C.C. 2d at 254.

If the Commission had stated why it preferred Flower's principals to Citizens' in regard to experience, I might be able to say—yes, those reasons are supported by the record and they seem reasonable. But in the absence of such comparative findings by the Commission, the Commission's reasons for preferring Flower are neither obvious nor "discernible" so far as I am concerned, even after attentive study of the evidentiary findings.

The evidentiary findings do show that Flower's principals had extensive broadcast experience. Flower's proposed general manager, Larson, had started in radio in 1926 and had remained in the commercial communications field until 1958. His most recent experience had been as president, stockholder, and general manager of a Salt Lake City radio and television station. The proposed program director, Auchincloss, had been a writer, director, and producer in television, radio and other fields since 1943.

However, the principals of Citizens likewise had extensive television broadcast experience on which the Commission failed to comment. Fay began in radio in 1927 and had been continually engaged as an officer and general manager of a *Rochester* radio and television station until 1957. Fraiberg began his television career in 1949, had been general manager of two television stations, and was still employed as a general manager when the Commission made its award. It is significant, moreover, that his experience embraced management of a TV station in a large metropolis.

It is possible that, for reasons undiscernible by me, the Commission could reasonably have concluded, *e.g.*, that Larson's background as a producer is more significant than Fraiberg's executive experience (though *a priori* I would have supposed exactly the reverse), or that Larson and Auchincloss make a better "team" than Fraiberg and Fay, or have associations of better quality. Any such conclusion with supporting evidentiary findings might have been an

acceptable ground for decision. But the Commission put forth only a peremptory conclusion which, in my view, was not adequately supported.

Turning now to Community, there is applicable here, *pari passu*, all that I have noted in discussion of Citizens with regard to the gaps in the findings, and the lack of reasoned judgment and analysis as to comparative experience of Messrs. Greene and Hanna.

But there is more, for Community was entitled to a credit for its past broadcast record. The significance of this is heightened by the Commission's determination, in line with the express comment in the Policy Statement, that no such credit is available for average performance, a standard that led to the denial of a preference to Star or Federal on this point. What is required is "such an unusual degree of attention to the public's needs and interests as to establish an unusually good past broadcast record." (9 F.C.C. 2d at 255). Community met this test. The Commission said: "Community has made a showing concerning the broadcast record of station WHAM during the period its 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station." And after recounting some aspects of that station's outstanding performance the Commission said: "In view of the facts that Greene was general manager and an owner of WHAM during this period and that Greene proposes to be in an active full-time supervisory capacity in Community's proposed station, we are convinced that Community must be given credit for the commendable record of performance compiled by WHAM while Greene was associated with it." (9 F.C.C. 2d at 253).

Because of this factor, Commissioner Johnson would have given the award to Community. That is of course not decisive. But it suggests that more was required than was provided by the Commission when it summarily said: "We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This

superiority arises from the experience factor." (9 F.C.C. 2d at 256).[13] When executives responsible for an outstanding past broadcast record are given a relatively low rating on ground of comparative broadcast experience, there would seem to be a situation which may possibly exist[14] but should not be asserted in the absence of reasoned comment and explanation. No such comparative comment was provided here.

There may be a clue to what the Commission had in mind in its concluding remark: "We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community itself, but rather of a 15-percent stockholder (and proposed general manager) who was a 50-percent owner of the station whose record is involved." (9 F.C.C. 2d at 257). This was reiterated on rehearing. (10 F.C.C. 2d at 719).

This seems to be a distortion of a more meaningful admonition in the *Policy Statement:*

> If a past record warrants consideration, the particular reasons, if any, which may have accounted for that

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[13] The Commission also said (pp. 256-257): "(We note that Community's participating stockholders also lack area familiarity)." The use of parentheses reinforces the text in indicating this was a make-weight. The evidentiary findings make clear that while Flower has stockholders familiar with the Rochester area, none of them plan full-time participation in station affairs. In the Policy Statement the Commission said that only a "slight credit" would be given for local residence of persons with ownership interests who will devote "some time" but "cannot be considered as actively participating in station affairs on a substantially full-time basis." (1 F.C.C. 2d at 396).

[14] *E.g.*, there may be newcomers whose experience will be taken into account in assessing participation by owners even though their prior activity "would not qualify as a past broadcast record, *i.e.*, where there was not ownership responsibility for a station's performance." *See* 1 F.C.C. 2d at 396.

> record will be examined to determine whether they will be present in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.[15]

Is the Commission saying that a 15 percent interest in the TV station was insufficient incentive to bring forth the ability and acumen that resulted in the outstanding record of Greene's station? It should be noted that Larson's interest is only 10 percent, and Auchincloss's is only 8.33 percent. Whatever the rationale, if any, for discounting Community's past record, the court ought not have to grope for the policy the Commission sought to further. *See Radio Station KFH Co.* v. *FCC*, 101 U.S. App. D.C. 164, 247 F.2d 570 (1957).

III

While a hearing examiner who has "lived with a case"[16] might have based a conclusion on the presence and acumen displayed by the various principals during the hearings, the Commission decided without the benefit of any pertinent examiner recommendation. I do not say the Commission necessarily erred in proceeding without further evidentiary hearings. However, its task was made more difficult by the lack of evidentiary findings of an examiner (or intermediate decision of a review board) purposefully addressed to the pending applicants. The Commission's obligation to provide findings meaningfully related to its result was enlarged accordingly.

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[15] 1 F.C.C. 2d at 398.

[16] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

I frankly put to myself this question, Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for a function like this, of choosing the best qualified among several competing applicants? Maybe an agency cannot meaningfully say more than why it screens out those applicants who fall by the wayside due to "demerits" in some prominent category, or who are plainly second best for some reason. Maybe all it can do as to the other applicants is say: These applicants are all reasonably qualified; we have no meaningful way of choosing on principle between them; all we can really do is speculate who will do the best job in the public interest; and our best possible hunch is X. I believe Justice Frankfurter has applied to the concept of administrative expertise the phrase of Justice Holmes[17] concerning intuition that outruns analysis.

The possibility that an agency may come to the point of resting on intuition is all the greater when it is recalled that there are no doctrines of burden of proof such as are available for decision of court cases when the proof stands in equipoise.

I for one would be prepared to sustain an action presented with such candor, but pause in saying that, to note that such a candid disclaimer would perhaps crystallize other and more acceptable solutions. Perhaps the Commission could advise the two or three applicants who survive after the first winnowing that they are in a run-off and now have the opportunity to enlarge the record in a more focused way. Perhaps the parties could settle the case. Perhaps a lottery could be used, for luck is not an inadmis-

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[17] Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907).

sible means of deciding the undecidable, provided the ground rules are known in advance.[18]

But all that is by the way, or perhaps for another day. In the case before us the Commission did not throw up its hands, so to speak. It purported to act in terms of reason, and I at least do not feel that I know the reason. "The administrative process will best be vindicated by clarity in its exercise."[19] I have general faith, notwithstanding some previous observations, that the public interest is best served by insisting that those who hold the trust of public office discharge their function with a conscientious statement of reasons, at least in matters adjudicated upon formal submission in an adversary process. This promotes confidence that decisions are unbiased and not arbitrary.[20] The requirement of findings and explanations, which are intended to assure neutrality and rationality, is enshrined in the core of our administrative law and the Administrative Procedure Act.[21] It should not be eroded with lip service.

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[18] For example, lot has been used for selection of bonds for redemption; designating location of candidates on an election ballot; designating which of the newly elected members of a body (*e.g.*, D.C. School Board elected in 1968) shall have a 1-year and which a 3-year term. Examples could readily be multiplied. Judicial machinery makes deliberate use of chance in selection of representative juries.

[19] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

[20] *Compare* J. Frank, "Law and the Modern Mind" (New York, 1963). The need to state reasons in opinions helps to eliminate irrelevant prejudice and arbitrary decisions, and may also force a trier of fact and law to grapple with unconscious preferences, and to articulate and place in perspective the preferences that shape his decisions.

[21] *See* section 8 of the Administrative Procedure Act, 5 U.S.C. § 557 (Supp. III, 1968).

IV

A final word on the role of the court in relation to the administrative process is here appropriate to place my dissent in perspective. I have already noted that a court should be sensitive to the demands on the time of busy administrators, that it is unrealistic to require or expect dotted "i's" and crossed "t's," that it is enough to be able to "discern" the "path" followed by the administrator even when a decision leaves something to be desired.[22]

Yet the judiciary must not abdicate its function of enforcing substantive and procedural requirements, what Professor Jaffe calls the "supervisory" function.[23] For the moment at least the Rochester public is being served in terms of service.[24] In the long run, the general public will benefit from attentive judicial insistence on the essentials of the administrative process. Insistence on articulated reasons helps assure that our agencies are selecting those licensees who will best serve the public, and in a broader sense, enables the public to repose confidence in the judgment of its decision-makers. I would remand for further consideration and findings.

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[22] *See* Colorado Interstate Gas Co. v. FPC, *supra* note 10; MG-TV Broadcasting Co. v. FCC, *supra*, note 10 (dissenting opinion).

[23] *See* Jaffe, "Judicial Control of Administrative Action" at 589 (1965): ". . . the effectiveness of judicial supervision should be judged not only in terms of the case which correction was administered, but in its effect on doctrine in the long run."

[24] At this time an interim sharing operation is in effect whereby the competing broadcast groups are jointly managing the station. While these enforced joint ventures often do not prosper because no one participant feels it has a long-term commitment to the success of the enterprise, in this instance the participants are working harmoniously and the effort is flourishing.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

On Consideration Thereof, It is ordered and adjudged by this Court that the Decision and Memorandum Opinion and Order of the Federal Communications Commission appealed from in these cases be, and they are hereby, affirmed.

Per Curiam

For the Court:

Nathan J. Paulson
Nathan J. Paulson
Clerk

Dated: January 30, 1969.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D. C. 20001

April 1, 1969

Nos. 21,277 & 21,541-21,547—*Star Television, Inc.* v. *F.C.C.*

Gentlemen:

Enclosed is a copy of the order denying your petition for rehearing. Your suggestion that this case be reheard *en banc* was transmitted to the full Court, and the purpose of this letter is to inform you that there not being a majority of the judges in regular active service in favor of having this case reheard *en banc,* it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

NATHAN J. PAULSON
Nathan J. Paulson, Clerk

By: ALEXANDER L. STEVAS
Alexander L. Stevas
Chief Deputy Clerk

ALS/gb
Encl.

Order

On consideration of appellants' petitions for rehearing in Nos. 21,277, 21,541, 21,542, 21,543, 21,544 and 21,546, it is

ORDERED by the Court that appellants' aforesaid petitions are denied.

Per Curiam.

Circuit Judge Leventhal would grant appellants' petitions for rehearing.

APPENDIX E

Communications Act of 1934

"Section 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." [47 U.S.C. § 301.]

Section 303. "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * *

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." [47 U.S.C. § 303(r).]

Section 307. "(a) The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act." [42 U.S.C. § 307(a).]

Section 309. "(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies,

whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application." [47 U.S.C. § 309(a).]

* * * * *

"(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearng subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. . . ." [47 U.S.C. § 309(e).]

Section 402. "(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

"(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit or station license, whose application is denied by the Commission." [47 U.S.C. § 402(a), (b)(1).]